

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-7216

ORIGINAL

To be argued by
WILLIAM G. SYMMERS

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

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P/S

JOSEPH NAVIGATION CORPORATION,

Plaintiff-Appellee,

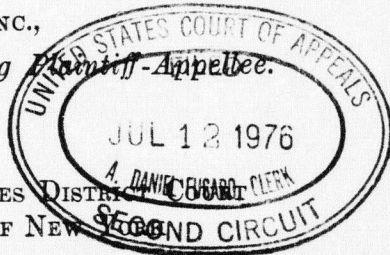
against

ARTHUR HENRY CHESTER, EDINBURGH ASSURANCE CO., LTD.,
STUYVESANT INSURANCE COMPANY and THREADNEEDLE AS-
SURANCE COMPANY,

Defendants-Appellants,

AMETCO SHIPPING, INC.,

Intervening Plaintiff-Appellee.



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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JOSEPH NAVIGATION CORPORATION,

Plaintiff-Appellee,

against

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STUYVESANT INSURANCE COMPANY and THREADNEEDLE AS-
SURANCE COMPANY,

Defendants-Appellants,

AMETCO SHIPPING, INC.,

Intervening Plaintiff-Appellee.

BRIEF FOR APPELLANTS

Issues Presented for Review

1. Was the grounding in fog and consequent loss of a merchant vessel on a voyage from Milwaukee to Russia caused by (a) the owner's failure, in violation of applicable safety statutes, to man the vessel with a First Mate and Second Mate, duly licensed, (b) the Master standing alone illegally prolonged six-hour mates' watches alternately with six-hour watches stood by the only other deck officer, licensed only as a third mate, in lieu of statutory four-hour watches required to be stood by at least three appropriately licensed mates, and none by the Master, (c) the owner allowing the vessel to sail thus under-

maned and with (i) an unrepaired, inoperable radar and (ii) an unrepaired, inoperable fathometer, essential aids to navigation in fog?

2. Was the vessel unseaworthy because of (a) the undermanning of the vessel, (b) the inoperable radar, (c) the inoperable fathometer, and, if so, was there (i) a breach of the implied warranty of seaworthiness in the contract of marine hull insurance in suit, or (ii) a breach by the owner of the condition in the additional perils insurance contract clause ("Inchmaree Clause") covering loss of the vessel directly caused by negligence of the master *provided* such loss does not result from want of due diligence by the Assured, the Owners or Managers of the vessel, or any of them?

3. Was the conclusion of the court below that the sole cause of the loss was the master's "error in navigation" manifestly incorrect?

Statement of the Case

This appeal involves a civil non-jury action in admiralty by the owner and mortgagee, respectively, of the Liberian merchant vessel JOSEPH H, to recover from defendants-appellants, marine hull insurers, the insured value of the vessel (\$375,000), plus interest, for the vessel's constructive total loss following stranding on Bic Island in the St. Lawrence River on the foggy morning of October 3, 1969. The opinion below is unreported, and is printed in the Appendix (R. 115). The case was tried in the Southern District of New York on June 9th and 10th, 1975, before the Honorable Kevin Thomas Duffy on documentary evidence and depositions, with the exception of plaintiff's chief engineer, who did not witness the stranding, and defendants' nautical expert. In the opinion below, the court concluded that the sole cause of the loss was the captain's

"gross error in navigation" (R. 121). No witnesses to the stranding were produced by plaintiffs, and none testified. Loss caused by error in navigation is not an insured peril in the policies in suit if the loss, although directly caused by the master's error in navigation, has resulted from want of due diligence on the part of the owner. Defendants' timely motions, pursuant to FRCP Rules 52 and 59, to amend and alter the court's findings and conclusions and for a new trial were denied, without opinion (R. 127). Judgment for plaintiffs in the sum of \$516,308.40 (including interest) was entered on March 5, 1976 (R. 125).

Plaintiff's complaint, filed on January 27, 1972, alleged that "as a result of one or more insured perils" the JOSEPH H became a total loss, and that plaintiff had performed all conditions of the insurance policies subscribed by the defendant Underwriters (R. 4). Defendants' answer denies loss of or damage to the vessel by an insured peril, alleging that the vessel at all times mentioned in the complaint was unseaworthy with the knowledge of plaintiff, and that the loss resulted from failure of plaintiff to exercise due diligence to send the vessel to sea in a seaworthy condition (R. 6). Ametco Shipping Inc., mortgagee of the vessel, as mortgagee and loss-payee in the insurance policies, filed an intervening complaint for payment of its mortgage lien of \$83,741.06 out of any judgment which Joseph Navigation Corporation may recover against Underwriters (R. 9).*

Plaintiff's evidence consisted of the log books for the voyage of the JOSEPH H, the transcript of the defend-

* So far as relevant, the policies insured "perils of the seas" and contained a standard "Inchmaree" clause as follows:

"This insurance also specially to cover . . . loss of or damage to the subject matter insured directly caused by . . . Negligence of Master, Mariners, Engineers or Pilots; provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the Vessel, or any of them . . ." (R. 294, lines 107-121)

ants' deposition of Niels Ladefoged, a licensed third mate, who was the only mate on the ship, various Bureau Veritas (classification society) certificates, among other documents, and the testimony of the chief engineer, Nicola Stamatiadi, plaintiff's only witness who testified at the trial. Neither Ladefoged nor Stamatiadi witnessed the grounding. Defendants' only witness who testified at the trial was Captain Douglas Hard, a master mariner and member of the faculty of the U.S. Merchant Marine Academy, Department of Nautical Science, called as an expert (R. 91). In addition, defendants introduced the deposition of Daniel Murphy, of Nova Scotia, an expert on electronical aids to navigation, who had inspected the radar on the JOSEPH H after the grounding (R. 208), and, among other documents, defendants introduced plaintiffs' answers to defendants' interrogatories (R. 309). In the opinion below the trial judge found that the JOSEPH H became a constructive total loss in consequence of the grounding, and that the loss was caused solely by the negligent navigation of the master. Defendants do not appeal from the finding that the vessel was a constructive total loss. This appeal is addressed to the court's conclusions that the casualty was solely caused by the master's negligence (R. 121), that the master was "fully rested" at the time of the casualty [despite his standing of improper, unlawful and unduly prolonged watches in lieu of mates standing watches, and without assistance of a qualified or, indeed, any mate on watch to assist in navigation (R. 122)], and that there was "no nexus between the alleged (sic) unseaworthiness, and the initial damage" to the vessel (R. 121). The unseaworthiness, as to which the court made no specific findings, included plaintiff's undermanning of the vessel, including absence of a requisite minimum complement of at least three duly licensed mates each to stand two four hour watches in each 24 hour period, in violation of safety statutes, and the plaintiff's failure to have in working order the ship's radar and fathometer, two essential aids to navigation in fog on a river, such as the St. Lawrence.

Statement of Facts

Plaintiff, Joseph Navigation Corporation, was organized under Liberian law in October, 1968, by Arthur Halpern, its president, for the purpose of acquiring the ocean-going cargo vessel EKBERG, to be renamed JOSEPH H (R. 288). This vessel, of 1845 gross tons, had been built in Germany in 1950. On November 1, 1969 Joseph Navigation Corporation purchased the vessel for \$147,500, entirely with borrowed funds, including a loan from intervening-plaintiff, Ametco Shipping Inc., in the sum of \$107,500, secured by a preferred ship mortgage (R. 288). The vessel, renamed JOSEPH H by plaintiff, was placed under Liberian registry. The vessel was equipped with an RCA model CR 103 radar, although this was not in operable condition when it was acquired by plaintiff (R. 290). The vessel was also equipped with a fathometer (Atlas echo sounder) which was not in working order (R. 290). Plaintiff did nothing to make these aids to navigation operable in the ensuing eleven months of its ownership and operation of the vessel (R. 330). Undisputed evidence is that the radar could have been made operable for about \$650 (R. 226, 237).

In August, 1969, the JOSEPH H was booked to carry a full cargo of wet salted cattle hides (2,583.94 tons) from Milwaukee to Riga, Latvia, USSR. This would involve a voyage of more than 4,000 nautical miles, which included 1,176 miles traversing Lake Michigan, Lake Huron, Lake St. Clair, Lake Erie, connecting rivers, canals and numerous locks, into the St. Lawrence to Montreal, for bunkers, and thence down the St. Lawrence into the open seas to Riga. JOSEPH H completed loading her cargo of hides on September 13, 1969, but did not sail from Milwaukee until September 21st because of machinery trouble (R. 288, 289). On sailing from Milwaukee the JOSEPH H, with Captain Carlos Cabezas in command, was short three licensed officers required by statute. She had only one watch officer, Vassilios Stefanidis, listed as "Chief Officer", but licensed

only as a third officer, and she lacked the requisite Second and Third Officers required by law. In the Engine department, there was a Chief Engineer and two assistant engineers, one less than required by law (R. 346, 349). Since the JOSEPH H sailed with two mates short, Captain Cabezas, in addition to his full time duties and responsibilities as master, was forced to stand two six hour watches each day, with the only mate also standing two six hour watches (R. 153, 154). The minimum Liberian safety regulations required that there be on the vessel "*in addition to her master, at least three mates, licensed in appropriate grades, who shall stand in three (4 hour) watches while such vessel is in navigation.*"*

JOSEPH H arrived at Montreal for bunkers on September 28th. She was attended there by plaintiff's president, Halpern (R. 344). At Montreal the mate, Staphanides, along with the Chief Engineer, the Third Engineer, and three other crew members, signed off the vessel. On September 30th, the day before sailing from Montreal, five new crew members were signed on. These men, strangers to the ship, included Niels Ladefoged, holder of only a third-mate's license, who was designated "Chief Officer", and Nicola Stamatiadi, Chief Engineer (Deck log, Exhibit 6; R. 289). Short of statutorily requisite deck and engine department officers, with only one watch officer (the newly-hired licensed third mate) and with radar and fathometer both remaining out of order, the JOSEPH H broke ground at Montreal early on the morning of October 1, 1969, heading down the St. Lawrence to the Atlantic and for Riga.

* The Liberian manning requirements (R. 302) are similar to those of the United States (46 U.S. Code §§ 222, 223, 673; 46 CFR § 157.20-10); and see Articles 4 and 14, International Labour Organization Convention No. 57 of 1936 (8 British Shipping Laws, Stevens & Sons, London, 1973). Their primary purpose is to promote safety at sea. *O'Hara v. Luckenbach S.S. Company*, 269 U.S. 364, 367 (1926); *Buttimer v. Detroit Sulphite Trans. Co.*, 39 F. Supp. 222 (D.C. Mich., 1941).

The master continued his two unlawful six hour watches (6-12), and mate Ladefoged stood the other two (12-6) illegally prolonged watches in each 24-hour period (R. 154, 290). Events for the trip from Montreal to Bic Island, where the JOSEPH H grounded at about 0730 on the morning of October 3rd, encompass a period of 48 hours, with Captain Cabezas, terminally ill, standing mates' watches, apart from his duties as master, for 24 hours of this period.*

Nothing unusual occurred on the first day out of Montreal, October 1st. The Montreal pilot was aboard at 0700 hours during the Captain's "watch". The vessel broke ground at 0715 hours. Pilots were changed at Three Rivers at 1428 hours (mate's watch), and again at Quebec at 2225 (Master's "watch"). Entries in the deck log book in the Captain's handwriting are from 0700 to 1200, and from 1815 hours to 2400 hours on this date (Deck log, Exhibit 6).

By 0600 hours on Thursday, October 2nd, Captain Cabezas was again standing mates' watch, with the Quebec pilot aboard. At 1230 hours the Quebec pilot was dropped, and at 1235 the JOSEPH H took her "departure" for Riga and proceeded down river but "with slow speed due to engine repair." (Exhibit 6). If, as is likely, the captain did not leave the bridge until after dropping the Quebec pilot, he could have had at most less than 4½ hours for food and rest before undertaking the 6-12 night watch on October 2nd, assuming (which is not the fact) that he had no master's functions, problems or responsibilities to command his attention during this period, including a life boat drill and engine breakdown. From 1600 to 1630 on October

* The opinion below erroneously states that "the vessel broke ground at Montreal on the morning of October 2nd" (R. 117). The vessel in fact broke ground at Montreal at 0715 hours on October 1st (R. 157, 289; Log book, Exhibit 6). This is relevant with respect to the court's conclusion that the master was "fully rested" at the time of grounding the vessel on October 3rd (R. 122; R. 132-136).

2nd, during mate Ladefoged's watch, there was a life boat drill. The mate was attending to the drill and instructing the crew in their duties (Exhibit 6). The master had to be at the conn on the bridge during this drill, as is customary even on ships with a full complement of deck officers (Hard, R. 107-108).

At about 2105 hours (9:50 p.m.) on October 2nd (Master's "watch"), the main circulating pump broke down, the main engine was stopped, and by 2130 hours the ship was anchored, in "poor visibility", "near the entrance of Bic Channel." (Exhibit 6; Chart, Exhibit 8) [Bic Channel lies between Bic Island and the eastern mainland, about twenty miles west of Rimouski]. The island is described in the Canadian Hydrographic Service "Sailing Directions Gulf and River St. Lawrence" (1975 ed.):

Ile du Bic, 2¾ miles long and about 1 mile wide, lies nearly 2¼ miles NW of Cap a l'Original. The island is thickly wooded, rising to an elevation of 180 feet (54^m9) to the tops of trees. Drying ledges of slate fringe the shore of the island.

While the repair work on the JOSEPH H was in progress at 2200 (10 p.m.) on the night of the 2nd, there was a serious accident in the engine room. Mate Ladefoged's log entry is explicit:

2200 While working in the engine room repairing the main circulating pump a spring holding the chain fall, that they were using, broke loose hitting the Ch. Eng. Nicolas Stamatiadi on the head and shoulder and the 3rd eng. Abelardo Menendez on the right leg. I treated the wounds on the ch. eng.'s head using 18 stitches and also the wound on the leg of the 3rd eng. N.E.L. (Exhibit 6).

The Chief Engineer remained unconscious until the afternoon of October 3rd (R. 66).

At 0530 on the morning of October 3rd the engine log book shows that orders were given to get steam to the main engine (Exhibit 9). This order was given by Captain Cabezas, not by the mate (R. 194). Before 0600, having been relieved by the master, mate Ladefoged retired to his bunk (R. 290). The deck log records that there was a "dense fog" at 0600 on the morning of the 3rd, the beginning of another "watch" for Captain Cabezas. At 0615 the deck log indicates that anchor was weighed and that the JOSEPH H got under way, with a notation that the weather at this time was "foggy". At 0730 hours, according to the log, the JOSEPH H was aground on Bic Island at position 48° 24.2' N, 68° 50.1' W, a shoal along the southeastern end of the island. The JOSEPH H eventually was towed to Quebec, where her cargo was discharged and, in April, 1970, she was sold for \$6,000.

Argument

Plaintiff-appellee's basic submission to the court below was deceptively simple, viz. (a) the policies insure losses caused by "perils of the seas", (b) stranding is a peril of the seas; (c) a loss directly caused by negligence of the Master, Mariners, Engineers or Pilots is expressly covered by the "Inchmaree" clause in the policies provided such loss did not result from want of due diligence by the Assured, Owners or Manager of the vessel or any of them, and, plaintiff argued, there was no want of due diligence. In the face of indisputable evidence of gross unseaworthiness of the vessel both as respects inadequacy of navigating officers in violation of safety regulations and inoperative essential aids to navigation in fog, the trial judge concluded that the sole cause of the stranding and loss of the vessel was the negligence of the master (R. 121). On the law and undisputed facts, defendants submit that the conclusion of the court below is manifestly incorrect and clearly erroneous.

POINT I

The Joseph H was unseaworthy because she was grossly undermanned in violation of applicable safety statutes and standards for safe navigation. The evidence cannot support a conclusion that the plaintiff's want of due diligence in violation of minimum mandatory safety statutes did not cause and could not have caused the loss.

JOSEPH H was a seagoing vessel of 1845 gross tons documented under the flag of the Republic of Liberia (R. 288).

The applicable Liberian manning statute provides:

Full complement required—A Liberian vessel shall not be navigated unless it has in its service and on board such complement of officers and crew as is necessary for safe navigation." (Liberian Code of Laws, 1956, Title 22, § 292; R. 299).

The Liberian Maritime Regulations, 1969, duly promulgated pursuant to the Liberian Code of Laws, provide:

10.292. *Manning Requirements*

(1) *Required Minimum Number of Deck Officers*

...

- (d) Every Liberian vessel other than a passenger vessel, of 1600 gross tons and over, shall have on board and in her service, in addition to her master, at least three mates, licensed in appropriate grades, who shall stand in three watches while such vessel is in navigation; ... (R. 302)

From the foregoing it is clear and explicit that at the very least three mates, licensed in appropriate grades (viz.,

first mate, second mate, and third mate), were necessary to meet the minimum statutory manning requirements for safe navigation of the JOSEPH H. This is consistent with United States law, which prohibits the navigation of any ocean or coastwise vessel of 1,000 gross tons or over unless she has on board and in her service, in addition to a master, three licensed mates who shall stand in three watches while the vessel is being navigated (46 U.S. Code § 223), and who shall not be required to be on duty more than 8 hours in any one day except under extraordinary conditions (46 CFR § 157.20-10). The primary purpose of these requirements is to promote safety at sea. *O'Hara v. Luckenbach S.S. Co.*, 269 U.S. 364 (1926); *Buttimer v. Detroit Sulphite Trans. Co.*, 39 F. Supp. 222 (D.C. Mich. 1941).

A vessel is unseaworthy when it is not reasonably fit in all respects to encounter the ordinary perils of the sea incident to the intended voyage. *Cary v. Home Insurance Company*, 235 N.Y. 296 (1923), citing *The Southwark*, 191 U.S. 1, 8 (1903). An undermanned ship is an unseaworthy ship. *Aguirre v. Citizens Casualty Co. of New York*, 441 F. 2d 141, 144 (5th Cir. 1971); *The Denali*, 112 F. 2d 952 (9th Cir. 1940); *Smith v. Northwestern F. & M. Ins. Co.*, 246 N.Y. 349, 357 (1927); Gilmore & Black, *The Law of Admiralty* (2nd ed. 1975), p. 894. It goes without saying that an unseaworthy ship is an unsafe ship, because it is not reasonably fit to encounter the ordinary perils of the intended voyage. In the case of the JOSEPH H the unseaworthiness related directly to the vessel's ability to navigate safely in fog. She was deficient in navigating officers (in violation of law), and in electronic navigation aids (radar especially) with which she was equipped but which the owner had neglected to put in working order. By sending the JOSEPH H to sea in an unseaworthy and unsafe condition as respects her ability to navigate in fog, the plaintiff invited disaster. Profit was the owner's paramount

consideration, and the risk of life and property evidently of little consequence. Had the vessel been carrying petroleum or hazardous cargo, a major disaster could have resulted involving loss of life and contamination. No principles of justice or sound judicial policy warrant or compel rewarding a shipowner, guilty of willful violation of law and wanting in due diligence to make his vessel seaworthy, with an insurance recovery in the face of the facts and the law applicable in this case. The casualty was not an insured peril.

In the opinion below the trial court was not impressed with what it termed "the alleged unseaworthiness" of the JOSEPH H as having any bearing on the loss. The opinion discounts Underwriters defenses as under "a form of policy which is archaic" (although used throughout the commercial maritime world and whose wording has been clarified and made certain by extensive judicial construction). The court concluded that plaintiff's violation of navigational safety statutes (requiring a minimum of three duly licensed mates to stand watches) "could not have in any way contributed to the stranding and the resultant loss of the ship" (R. 122). This, defendants submit, flies in the face of logic and the old adage that two heads are better than one. With a qualified licensed navigator on watch on the bridge to assist the master, would the master have made the same "gross error in navigation" that the court below found that he did, even in a "dead reckoning" situation? Had the vessel's radar, its "seeing eye", been operable, especially with a mate on watch to assist the master, could Bic Island have not been seen and avoided? No, concluded the court, there was no one more qualified than the master to navigate the vessel through Bic Channel by dead reckoning "an accepted part of navigation since the days of the Phoenicians" (R. 121). The master, said the court, was "fully rested" when he weighed anchor on the morning of October 3rd and proceeded (with-

out benefit of any watch officer) in fog through Bic Channel (R. 122).^{*} In the face of the plaintiff's uncontroverted statutory violations for failure to comply with the minimum manning requirements of the Liberian law, *the plaintiff had the burden of proving that its statutory violations could not have caused or contributed to the loss. In re Seaboard Shipping Corporation*, 449 F. 2d 132, 136 (2d Cir. 1971), cert. denied, 406 U.S. 949 (1972); *Richelieu Nav. Co. v. Boston Marine Insurance Co.*, 136 U.S. 408 (1890); *United States v. Petroleum Navigation Co.*, 85 F. 2d 54 (2d Cir. 1936), cert. denied, 299 U.S. 603. Tacitly, at least, acknowledging this rule, the court below nevertheless concluded that plaintiff met this burden of proof. But plaintiff's evidence established no more than that the ship went hard aground in a fog, with the master alone at the conn. Defendants submit that the trial judge's conclusions (a) that the plaintiff's violations of the Liberian minimum statutory manning requirements had no causal connection with the stranding, (b) that such violations could not have caused the stranding, and (c) that plaintiff met its burden of proof in these respects, are manifestly incorrect and clearly in error.

^{*} No witness was produced who saw the master at this time, or who witnessed the stranding. The master could not have been well "rested". Not only was he terminally ill, but he had been on a difficult voyage commencing at Milwaukee thirteen days before (Exhibit 6). During all this time he had not only his own duties and responsibilities, but had been assuming the duties of 1½ mates, including standing mates' watches on the bridge, for an unlawfully prolonged 12 hours a day during the entire voyage except for two days at Montreal. The evidence on this is discussed in defendants' post-trial motions pursuant to FRCP Rules 52 and 59 (R. 132-136).

POINT II

Apart from being undermanned in violation of law the Joseph H was unseaworthy because her radar and fathometer were not in working order and use of these aids to navigation in fog with a requisite complement of qualified deck officers could and in fact would have avoided the stranding.

When plaintiff acquired the JOSEPH H in November, 1968, the vessel was equipped and thereafter remained equipped with an RCA radar and a fathometer (R. 290). Although not mandated by statute, radar and fathometer are essential aids to river navigation in fog (Hard, R. 96). A compass alone is not sufficient (id.). It is common knowledge that radar, developed in the 1930s, first widely used and an invaluable aid to Allied navies and shipping during World War II, has since been installed as the general rule rather than as an exception on virtually every seagoing merchant vessel. A glance through the pages of any annual Lloyd's Register or Bureau Veritas Record (e.g., Exhibit I, R. 308) over at least the last fifteen years confirms this. [The Record of Bureau Veritas, Paris, the classification society in which JOSEPH H was enrolled, shows the vessel (and all others listed on the same page, Exhibit I) to be equipped with radar]. Although radar (improperly used) has been criticized as contributing to collisions between two moving ships, there is no question about its effectiveness in detecting the presence and position of a large stationary object such as Bic Island.

Defendants contended in the trial court, and reiterate on this appeal, that the plaintiff additionally was guilty of want of due diligence causing or contributing to the collision by neglecting to put the already installed radar and fathometer in working order before allowing her to sail. The radar could have been repaired for \$650

(Murphy, R. 237). There was no evidence regarding the fathometer (Atlas echo sounder), other than that it, too, is an essential aid to navigation in fog (R. 96), and was not in working order (R. 290). There were other cumulative deficiencies that, defendants urged below, compounded inability of the JOSEPH H to navigate safely, including absence of a deviation card for the magnetic compass, absence of a gyro-compass, and an uncalibrated radio direction finder (although there was no evidence that it was used or relied upon at any time).*

Of all these deficiencies, radar of course would provide the simplest and most effective means of detecting and avoiding Bic Island, and the only means of *seeing* the island in a dense fog in time to avoid stranding by otherwise negligent dead reckoning navigation of the unasisted master.

There are sound reasons and precedents to support the conclusion that an owner whose seagoing merchant vessel is equipped with essential aids to navigation, who neglects to put them in operable condition, is guilty of due diligence and, indeed, in the circumstances of this case, willful neglect. Radar and fathometer obviously are even more essential when the vessel itself is short of deck officers required by statute for safe navigation. This Court, in a famous opinion by Judge Learned Hand, *The T. J. Hooper*, 60 F. 2d 737 (2d Cir. 1932), cert. den. 287 U.S. 662, held that the owner of tugboats having on board radio receivers (not required by statute) that were inoperative, and therefore incapable of receiving Weather Bureau storm warnings, had failed to provide seaworthy

* *Waterman Steamship Corp. v. Gay Cottons*, 414 F. 2d 724, 735 (9th Cir. 1969), cited to the court below, is a well-documented refutation of the court's rejection, as "totally specious" (R. 119), of defendants' submission that the uncalibrated radio direction finder constituted unseaworthiness. The evidence was that periodic calibration is necessary (R. 229). Plaintiff could not say when it had last been calibrated (R. 319).

tugs. Judge Hand, said:

"Indeed, in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices . . . Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission." (p. 740).

When the *T. J. Hooper* was decided, radio receiving sets on towboats were not customary. Radar and fathometers, certainly on virtually all seagoing merchant vessels built after World War II, have been customary. This is all the more reason for faulting the plaintiff for want of diligence to take reasonable, clearly prudent and indeed imperative precautions to have these essential, available aids to navigation in operating order.

Twenty-eight years after the *T. J. Hooper*, in an opinion by Judge Medina, *Afran Transport Co. v. The Bergechief*, 274 F. 2d 469 (2d Cir. 1960), the Court said, by way of *dictum* as respects the duty of a vessel to be equipped with radar: "We think this case (*The T. J. Hooper, supra*) shows which way the wind blows" (p. 479). The Court prophesied "that a rule requiring radar, subject to some limitations and qualifications, will sooner or later be formulated" (p. 474). Here the JOSEPH H was already equipped with radar (and fathometer), and the fault of the plaintiff is more flagrant, in neglecting over a period of eleven months to put them in working order, than it would have been if these instruments not been supplied with the ship when it was acquired by plaintiff. Judge Friendly, sitting by designation, in *Farrell Lines, Inc. v. Birkenstein*, 207 F. Supp. 500, 510 (SDNY, 1962), a tugboat dock damage case, suggested that if the offending tug's radar had been the only eye available to it (as it was on the JOSEPH H) the standard imposed in *The T. J. Hooper* would be applicable, and the tug owner would be faulted for unseaworthiness.

POINT III

Loss of the Joseph H resulted from want of due diligence of the plaintiff and did not come within the additional perils coverage of the Inchmaree clause in the policies.

The issue in the instant case involves not simply a question of determining whether the immediate or direct cause of the stranding was the master's negligence. The issue under the "Inchmaree" clause in the contracts in suit is whether the loss, even if directly caused by the master's negligence, "resulted from want of due diligence by the Assured, the Owners or Managers of the vessel, or any of them as the real, efficient and dominant, i.e., proximate cause.* Plaintiff argued below that the proximate cause of the loss of the JOSEPH H was the master's negligent navigation, as "the cause nearest to the loss", quoting Justice Holmes that "we are not to take broad views but generally are to stop our inquiries with the cause nearest to the loss." *Queen Insurance Company of America v. Globe & Rutgers Fire Insurance Co.*, 263 U.S. 487, 492 (1924). In the opinion below the court concluded that "the proximate" and only cause of the loss was the master's negligence in navigation, and that there was "no nexus" between the "alleged unseaworthiness" of the vessel and the loss (R. 121). Plaintiff's evidence on this point consisted solely of the deck log entries indicating that the master (with no deck officer on watch to assist in navigation) weighed anchor at 0615 on the morning of October 3rd, when it was "foggy", and that the vessel went hard aground at 0730 (Exhibit 6), and the conclusion of the mate, Ladefoged, who was in his cabin asleep all this time, that "the captain simply made a mistake" (R. 206).

* The "Inchmaree" clause is annotated in 98 ALR 2d 952 (1964).

In short, the evidence was no more than that the vessel, in fog, with the master alone at the conn, went aground, without benefit of a mate on watch, or an operable radar or an operable fathometer.

In *The Maria*, 91 F. 2d 819, 824 (4th Cir. 1937), a Harter Act case, the vessel stranded, damaging cargo. Certain charts and other navigational data had not been supplied by the owner. The court found that these were "essential for safe navigation of the ship, and she was unseaworthy without them." The court rejected the owner's argument that the loss was due to negligent navigation rather than to the unseaworthiness.

The JOSEPH H, navigating in fog by dead reckoning of the master, apart from being crippled in her ability to navigate safely, because of undermanning, was further handicapped by being blindfolded (radar out of order) and made deaf (fathometer out of order). If a blindfolded man walks into a glass door, is the cause of his injury the fact that he was blindfolded, or the consequent fact, last in point of time, that he walked into the door? Was there no "nexus" or causal relationship between the blindfolding and the injury?

Nearly sixty years ago, Judge Hough for this Court said:

"A workman compelled to handle familiar tools with one eye blindfolded, and injured by his own blundering use of them, is in truth injured by the person who puts compulsion upon him." *Muller v. Globe & Rutgers Fire Ins. Co.*, 246 F. 759, 763 (2d Cir. 1917) (quoted in Gilmore and Black, *The Law of Admiralty* (2d ed. 1975), p. 78 preceding ftn. 99).

In a 1970 case, Judge Tyler in the District Court observed that courts, "searching backward from the caused event for the proximate cause, . . . have sought out the first cause from which the event flows in a natural, almost

mechanical and inevitable manner; what has been called 'the real efficient cause of the loss'. *Flota Mercante Dominicana v. American Manufacturers Mutual Ins. Co.*, 312 F. Supp. 58, 60 (SDNY 1970), citing *Lanasa Fruit Steamship & Importing Co. v. Universal Insurance Co.*, 302 U.S. 556, 562 (1938). Any blundering navigation of the master of the JOSEPH H was the consequence of the compulsion put upon him by plaintiff to sail without assistance of requisite and necessary licensed mates standing four hour watches to assist in navigation, requiring the master to stand unlawfully mates' watches for unlawfully prolonged hours with no deck officer on watch to assist him, and to navigate with the ship's eye (radar) blindfolded and her ear (fathometer) deafened. Plaintiff's statutory violations and neglects compelled the master to sail so handicapped as respects ability to navigate safely in fog that the voyage was an invitation to the disaster that befell the ship.

In *Pan American World Airways Inc. v. The Aetna Casualty & Surety Co., et al.*, 505 F. 2d 989, 1006 (2d Cir. 1974), not a marine insurance case, this Court adverted to precedents establishing "a mechanical test of proximate causation for insurance cases, a test that looks only to 'causes nearest to the loss'", quoting *Queen Insurance Company v. Globe & Rutgers Fire Insurance Co.*, 263 U.S. 487, 492 (1924). The Court in *The Pan American* case, added: "This rule is adumbrated by the maxim contra proferentum: if the insurer desires to have more remote causes determine the scope of the exclusion, he may draft language to effectuate that desire" (p. 1007). Drafting language to effectuate the intent is precisely what was done by the "Inchmaree" clause in the policies in suit, adding to the traditional risk of "perils of the seas" the risk of loss "directly" caused by the negligence of the master, *provided that such loss "has not resulted from want of due diligence by the Assured, the Owners or Managers of the vessel, or any of them."* Since a loss directly caused by negligence

of the master must always be the "cause nearest the loss", the due diligence condition in the "Inchmaree" clause would be rendered totally meaningless if the cause nearest the loss were the only cause to be considered.

A closer look at *Queen Ins. Co. v. Globe Ins. Co.*, *supra*, beyond the mere extraction from context of the phrase "cause nearest to the loss" is warranted. Although Justice Holmes said that "the common understanding is that in construing these policies we are not to take broad views but generally are to stop our inquiries with the cause nearest to the loss" (492), he went on to pay deference to and follow the English decisions, saying: "There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business, . . ." (493). In *Smith, Hogg & Co., Limited v. Black Sea & Baltic General Ins. Co. Ltd.* [1940] A.C. 997 (H.L.), Lord Wright said that the decisive question is: ". . . would the disaster not have happened if the ship had fulfilled the obligation of seaworthiness, even though the disaster could not have happened if there had not also been the specific peril or action" (p. 1005). In that case, the vessel, with a deck cargo of lumber, was permitted by her owners to go to sea in an unstable and therefore unseaworthy condition. Branson, J., in the trial court, had held that although the vessel was unseaworthy and a shipowner's warranty in this respect had been broken, the necessary nexus between the unseaworthiness and the ensuing disaster (capsizing) was absent, and that the accident took place not because of the unseaworthiness but by reason of negligent acts or omissions of the master. This was reversed in the Court of Appeal, which agreed with the finding of Branson, J. on the issue of unseaworthiness, but held that the cause of the disaster was the unseaworthiness and not the conduct of the master who failed to take corrective action after the voyage had commenced.

On proximate cause, *Leyland Shipping Company, Limited v. Norwich Union Fire Insurance Company*, [1918] A.C.

350 (H.L.), should not be overlooked. There the ship was insured against sea perils, with a warranty against all consequences of hostilities. The ship was struck by a German torpedo, crippling her, but she made her way to and was berthed alongside a quay; the harbor authorities, fearing she would sink, caused her to be moved to an anchorage inside the outer breakwater, where she was moored and remained for two days, taking the ground at each ebb tide. Finally her bulkheads gave way and she sank. It was held that the continuous grounding, the direct cause of the sinking, was not proximately caused by the sea peril (grounding), as a *novus actus interveniens*, although this was latest in point of time, but that the sinking was caused by the torpedoing. The question of which of two causes is proximate, Lord Dunedin said, "is not solved by the mere point of order in time" (p. 363). Lord Shaw said: "To treat proximate cause as if it was the cause which is proximate in time is out of the question (p. 369) . . . (if) consideration be limited to a cause proximate in time (it), destroys the exception (in the policy) altogether" (p. 370). Lord Shaw's judgment is quoted with approval by the Supreme Court in *Lanasa Fruit Steamship & Importing Co. v. Universal Insurance Co.*, 302 U.S. 556 (1938), at 562-563.

To treat the master's stranding of the vessel, the direct or immediate cause, last in point of time, as the proximate cause, as did the court below, would destroy altogether the deliberate and critical wording of the "Inchmaree" clause. In respect of losses "directly caused" by the master's negligence, no coverage is afforded by the "Inchmaree" clause where such loss has "resulted from want of due diligence" by the shipowner. Here the "direct" cause, master's negligence, resulted from plaintiff's neglect and want of due diligence to provide him with requisite men and essential equipment for safe navigation. The obligation of due diligence, in the "Inchmaree" clause, affecting as it does safety of life and property, should not be dis-

missed as meaningless; nor should it be construed so as to reward shipowners guilty of deliberate violations of statutory safety regulations and failure to make their vessels safe for navigation within the limits of due diligence.

POINT IV

The loss of the Joseph H is attributable to unseaworthiness in breach of plaintiff's implied warranty of seaworthiness in the Marine Insurance contracts.

Although the defense of breach of warranty of seaworthiness was argued below, and briefed by counsel for both sides, the opinion of the trial judge makes no specific reference to it, and makes no finding in respect of the seaworthiness or unseaworthiness of the JOSEPH H. Yet the evidence is clear and decisive that the JOSEPH H was sent to sea on her last voyage, down the St. Lawrence, in unseaworthy condition, unsafe for navigation in fog, lacking the minimum requisite deck officers to assist in navigation, and additionally handicapped by the shipowner not having put in working order two essential aids to navigation, radar and fathometer. "There is nothing in the law of marine insurance more important to commerce and the preservation of human life" than a strict adherence to the implied obligation of seaworthiness. II Arnould, *The Law of Marine Insurance and General Average* (15th ed. 1961), 10 British Shipping Laws § 695. Although this observation was made in respect of the implied warranty of seaworthiness in voyage policies, it is similarly appropriate to time policies, such as the policies here in suit. The rule has been codified succinctly in England, in Section 39(5) the Marine Insurance Act, 1906 (6 Edw. 7, c. 41):

Warranty of Seaworthiness of Ship

39. . . .

* * *

(5) In a time policy . . . where with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

Historically there have always been sound and pragmatic reasons for imposing the obligation of seaworthiness on shipowners. In *Wilkie v. Geddes* [1815] 3 Dow 57, 3 Eng. Rep. 998, Lord Eldon pointed out that the interests of commerce and due regard to the lives of seamen are much concerned that the ship be so fitted out as to be able to encounter the ordinary perils of the sea (p. 59). Lord Redesdale added: "Unless the assured were bound to take care that the vessel was in every respect sea-worthy, the consequence would be most mischievous: for the effect of insurance would be to render those chiefly interested much more careless about the condition of the ship, and the lives of those engaged in navigating her" (p. 60). In modern times, with large vessels frequently carrying dangerous and pollutive cargoes, there is an added imperative reason for enforcing at the very least the obligation of due diligence on the part of shipowners to avoid sending an unseaworthy, unsafe ship to sea. In the United States, a frequently quoted statement of the rule is Judge John Brown's in *Saskatchewan Government Ins. Office v. Spot Pak*, 242 F. 2d 385, 388 (5th Cir. 1957): ". . . that the Owner, from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition. And, unlike a breach of warranty of continuing seaworthiness, express or implied, which voids the policy altogether, the consequence of a violation of this 'negative' burden is merely a denial of liability for loss or damage caused proximately by such unseaworthiness." Plaintiff's submission below was simply that the JOSEPH H with the master alone at the conn, navigating by dead reckoning, ran the ship aground in a fog, and the opinion of the only deck officer, Ladefoged, a licensed third mate, who was asleep at the time, that "The captain simply made a mis-

take". The captain gave Ladefoged no explanation for the grounding (R. 206). On this evidence, the court below said: "Assuming that this negligence was the proximate cause of the grounding of the JOSEPH H (which logical proof showed it was), there is no nexus between the alleged unseaworthiness and the initial damage to the insured vessel." (R. 121). The proof was that the master was terminally ill and overworked, standing watch and navigating in fog by dead reckoning without a deck officer in violation of safety regulations, with two essential aids to navigation, radar and fathometer, not having been put in working order by plaintiff. The court concluded that these unsafe conditions, imposed on the ship by plaintiff, could not in any way have caused the loss (R. 122). This was patently erroneous.

The discussion of causation under Point III, *supra*, in respect of want of due diligence of the plaintiff under the "Inchmaree" clause, is equally applicable to the plaintiff's breach of warranty of seaworthiness, which vitiates coverage for stranding. Neither plaintiff's proofs, nor the evidence as a whole, support a conclusion that plaintiff's violations of statutory regulations for safety of life and property at sea, affecting the vessel's ability to navigate safely, and want of due diligence to make the vessel seaworthy, did not and could not have caused the loss. To the contrary, defendants submit, the evidence establishes that even without application of the Pennsylvania doctrine (and most certainly with its application), the loss of the JOSEPH H must be attributed to plaintiff's want of due diligence and to the consequent unseaworthiness of the vessel. Where, as here, there has been a statutory violation, The Pennsylvania doctrine acting "as a sanction to enforce compliance with regulations designed to promote maritime safety . . . penalizes violators of the safety rules by imposing on them a severe burden of proof that may be decisive when the causes of the accident are un-

known or in dispute." *Andros Shipping Co. v. Panama Canal Company*, 298 F. 2d 720, 727 (5th Cir. 1962). Plaintiff's burden was to prove that its statutory violations not only did not but that they could not have caused the loss. The trial court was manifestly incorrect in concluding that the plaintiff's failure to provide the necessary deck officers on the JOSEPH H, in violation of safety regulations, exacerbated by the additional handicap imposed upon the master of being compelled to navigate in fog an unseaworthy ship alone, by dead reckoning, without radar or fathometer in working order, did not cause and could not have caused the stranding of the JOSEPH H.

CONCLUSION

The judgment of the trial court should be reversed.

Respectfully submitted,

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United States Court of Appeals
For the Second Circuit

Joseph Navigation Corporation
Plaintiff-Appellee
against
Arthur Henry Chester, Edinburgh Assurance Co.,
Ltd. Stuyvesant Insurance Company and Thread Needle
Insurance Company
Defendants-Appellants
Ametco Shipping Inc.,
Intervening Plaintiff-Appellee

On Appeal from the United States District Court
for the Southern District of New York

AFFIDAVIT
OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

Raymond J. Braddick, agent for Symmers Fish & Warner Esqs.

deposes and says that he is over the age of 21 years and resides at
Levittown, New York

That on the 12th. day of July, 1976

he served the annexed Appendix and Brief

upon

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One World Trade Center
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Kirlin Campbell & Keating Esqs.
Attorneys for Intervening Plaintiff-Appellee
120 Broadway
New York, New York

in this action, by delivering to and leaving with said attorneys

three true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons
mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 12th.

day of July, 1976

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4609708
Qualified in Onitawa County
Commission Expires March 30, 1977

BEST COPY AVAILABLE